In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 279

TURNBULL, INC., TRANSFEREE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The H. R. Henderson & Co., acquired all of the stock of petitioner on February 5, 1954, pursuant to an agreement reached on January 27, 1954.[1] On the prior day, petitioner had transferred accounts receivable having a face value of $420,000 to the Price Construction Co.—52 percent of whose stock was owned by three individuals who also owned 90 percent of Henderson's stock. Petitioner received in exchange $50,000 cash, a note for $150,000, and the assumption of

[1] Petitioner was previously known as J. Gordon Turnbull, Inc. The events leading to the acquisition are described in the Petition for a Writ of Certiorari and Memorandum in Opposition in *J. Gordon Turnbull, Inc.* v. *Commissioner*, No. 278, this Term, a companion to the present case.

278-762—67

contingent liabilities which the Tax Court found (Pet. App. B–51) "so remote as to be virtually non-existent."

Price realized $469,608.34 on petitioner's receivables, and sought to offset the resulting income against operating losses carried forward from prior years. The Commissioner issued a deficiency notice to petitioner, charging that the income received by Price on the receivables was in fact Henderson's, and that petitioner was liable as a transferee of Henderson. On a petition for redetermination, the Tax Court held that (Pet. App. B–50, 52) there had been an anticipatory assignment of petitioner's income under the rule of *Helvering* v. *Horst*, 311 U.S. 112, *Helvering* v. *Eubank*, 311 U.S. 122, and related cases,[2] and sustained the Commissioner's determination that the petitioner had received income of $423,777.25 during the tax year in issue—1954, the full amount which Price collected in 1954 on petitioner's receivables. The court of appeals affirmed.

Two questions are presented. The first is whether income resulting from Price's collection of petitioner's receivables was properly attributable to Henderson.[3] The second is whether petitioner is Henderson's transferee. Both questions were properly answered in the

[2] *Lucas* v. *Earl*, 281 U.S. 111; *Burnet* v. *Leininger*, 285 U.S. 136; *Harrison* v. *Schaffner*, 312 U.S. 579; *J. Ungar Inc.* v. *Commissioner*, 244 F. 2d 90 (C.A. 2); *Wood Harmon Corp.* v. *United States*, 311 F. 2d 918 (C.A. 2).

[3] The income was attributed to Henderson, rather than petitioner, because during 1954 the two filed consolidated returns with Henderson the parent company.

affirmative. No conflict exists on an issue essential to the result. There is no justification for further review.

1. Petitioner's attack on the attribution of Price's collections to Henderson is based on an argument that the rule of *Horst* and *Eubank* applies only when the assignee is "the natural object of a donor's bounty" and never to a transaction between "strangers" (Pet. 9–11). There is no such limitation on the rule in question and the petitioner cites no supporting authority. In *Horst* and *Eubank*, application of the rule was made to rest solely on the assignor's command of the right to receive and, thus, to dispose of, the income. Thus, in *Eubank*, the opinion recites only that the income rights were transferred to a corporate trustee, without reference to the motivation of the assignment or to the identity of the beneficiary of the trust or his relationship to the assignor. 311 U.S. at 124–125. This Court explained in *Horst*, 311 U.S. at 117, that the rule applies wherever the holder of a right to receive income satisfies, through an assignment of that right, personal interests which he could equally have achieved by himself collecting the income and disbursing it to the assignee, and that this is true "whether the satisfaction is the purchase of goods at the corner grocery, the payment of his debt there, or such nonmaterial satisfactions as may result from the payment of a campaign or community chest contribution, or a gift to his favorite son."

Quite another question was at issue in *Commissioner* v. *P. G. Lake Inc.*, 356 U.S. 260; *Hort* v. *Commissioner*, 313 U.S. 28; *Watson* v. *Commissioner*, 345 U.S.

544; *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130, the line of cases for whose application petitioner contends (Pet. 9, 10). Those cases required determination of the character of the income in the hands of the assignee and not, as here, the taxability of the assignor. Petitioner has simply transferred its profits at less than half value to an affiliated corporation which had a loss carryover sufficient to eliminate taxes. Nothing in the cases which petitioner cites would allow a court to accept petitioner's contention that the transaction was a bona fide sale, which sheltered its profits from taxes.[3]

2. After Henderson's acquisition of petitioner's stock, the two corporations filed consolidated tax returns for 1954 and 1955. Then Henderson was merged into petitioner. The merger agreement provided that "all debts, liabilities and duties of" each corporation would "attach to" petitioner "and may be enforced against it to same extent as if * * * incurred or contracted by it" (Pet. App. B–6, B–7).

The courts below first based petitioner's transferee liability on the merger agreement, which they construed as an assumption of Henderson's liabilities. There seems to be no other reasonable reading

[3] In *Jones* v. *Commissioner*, 306 F. 2d 292 (C.A. 5), cited by petitioner (Pet. 12), the assignment was found to have been at arm's length and for a valuable consideration. The other cases there cited by petitioner, *Rhodes' Estate* v. *Commissioner*, 131 F. 2d 50 (C.A. 6); *Bell's Estate* v. *Commissioner*, 137 F. 2d 454 (C.A. 8); and *McAllister* v. *Commissioner*, 157 F. 2d 235 (C.A. 2), involved assignments for adequate consideration and the question was as to the character of the income in the hands of the assignor.

of the language of the document, notwithstanding petitioner's assertion of error (Pet. 14).[4] Further, even absent the express provisions, the agreement to assume would be implied from the circumstances of the merger transaction. See 15 Fletcher, *Cyc. Corporations* (Perm. ed.), Section 7329, at 634–636; *Consolidated Electric Coop.* v. *Panhandle E. Pipeline Co.*, 189 F. 2d 777, 782 (C.A. 8).

As a wholly independent ground, the courts below based the imposition of transferee liability on petitioner's execution of Treasury Form 2045, which stated that petitioner "is the transferee of assets" of Henderson "and assumes and agrees to pay the amount of any and all Federal income * * * taxes * * * due and payable by" Henderson (Pet. App. B–7 & n. 5). There is no merit to petitioner's claim (Pet. 14) that liability cannot be based on the form absent a finding that the value of the assets it received in the merger exceeded the liability to be imposed. Such a requirement might be appropriate if liability were imposed because of equitable reasons independent of the express written adoption of transferee status. But, as the Tax Court points out (Pet. App. B–45), petitioner was held liable as transferee at law—not in equity—and, under the established principles governing such liability, was liable for all of the transferor's debts without limitation to the value of the assets transferred. See *Bos Lines, Inc.*

[4] In any event, this question is only one of construction of contractual terms peculiar to this case and would not merit review by this Court.

v. *Commissioner*, 354 F. 2d 830 (C.A. 8); *American Equitable Assurance Co. of New York* v. *Commissioner*, 27 B.T.A. 247, affirmed, 68 F. 2d 46 (C.A. 2); *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. 2d 77, 80-81 (C.A. 10); *Kamen Soap Products Co.* v. *Commissioner*, 230 F. 2d 565 (C.A. 2); *Texsun Supply Corp.* v. *Commissioner*, 17 T.C. 433.

As a third ground for ~~its~~ the decision, the courts have found petitioner estopped to deny its status as transferee. Petitioner is correct (Pet. 15) in stating that *Daugette* v. *Patterson*, 250 F. 2d 753 (C.A. 5), on which the court relied, and *Uinta Livestock Corp.* v. *United States*, 355 F. 2d 761 (C.A. 10), offer conflicting standards for determining the existence of an equitable estoppel in tax litigation. But the estoppel ruling was not essential to the ruling against petitioner, so that resolution of the conflict in this case would avail petitioner nothing.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
WILLIAM A. FRIEDLANDER,
Attorneys.

AUGUST 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967